As to the Examiner's first argument, i.e. "the term 'about' is not defined by the claim," there is no requirement that the claims themselves provide definitions for terms used therein. It is sufficient that the term be understandable to one of ordinary skill in the art, or adequately defined in the specification of the application. As shown above, considered as a whole, the terms of the claim are definite to one of ordinary skill in the art. Thus, the rejection should be withdrawn.

The second argument, i.e., "the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention" is factually deficient. The Examiner is directed to Examples 1-4 of the present application. In particular, Example 2 sets forth a working example of a carbonated beverage having a low Glycemic Index of less than "about 55." It is therefore submitted that there is a standard for ascertaining the requisite "degree" in the present application, even though the claims are not required to be limited to that illustration. Therefore, for all of the foregoing reasons, the rejection under 35 U.S.C. § 112, second paragraph should be withdrawn.

*The Rejection under 35 U.S.C. § 102*

Claims 1-7, 17, 18 and 20 are rejected under 35 U.S.C. § 102 (b) as anticipated by Product Alert (v. 28, n. 11). For the following reasons, Applicants respectfully traverse these rejections.

The present invention is directed to food and beverage compositions that reduce the postprandial rise in blood glucose (described as low Glycemic Index) that synergistically acts to provide enhanced metabolism in the mammalian system and inhibit the storage of systemic fat. As an additional benefit, these low Glycemic Index compositions have surprisingly been found to enhance the perceived positive mood and energy in the consumer, without rapid depletions of blood glucose (*i.e.*, mediation of blood glucose) while reducing the insulin response. Such mood and energy enhancements are significantly enhanced relative to compositions containing only green tea, or those that exhibit a high Glycemic Index.

Under 35 U.S.C. § 102, a claim is anticipated only if each and every claim is found, either expressly or inherently described, in a single prior art reference. *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987). Additionally, the identical invention must be shown in as complete detail as is contained in the claim. *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236 (Fed. Cir. 1989). Presently, the Examiner has based the rejection on Product Alert (v. 28, n. 11) which discusses Cinagro Energy Plus Healthy Whole Body Tonic. In contrast to the present invention, which claims a "Glycemic Index of about 55 or less," the Product Alert does not even mention the Glycemic Index value of the product. The Examiner presumes that "because fruit juices are used and no mention of sucrose, glucose or maltose is mentioned, it is inherent that the Index is within Applicants' range." However, inherency may not be established by probabilities or possibilities. The mere fact that a certain thing *may* result from a given set of circumstances is not sufficient. *In re Oelrich*, 666 F.2d 578, 581 (CCPA 1981). Thus, because the Product Alert fails to mention the specific Glycemic Index of the product, it is an improper assumption that it would inherently fall within Applicants' claimed range. Therefore, Applicants respectfully assert that the

Examiner has failed to establish that the present invention is anticipated under 35 U.S.C. § 102. Thus, this rejection should be withdrawn.

*The Rejection under 35 U.S.C. § 103*

Claims 1-20 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Product Alert (v. 28, n. 11). Applicants respectfully traverse this rejection.

The generalization that it would have been obvious to one of ordinary skill in the art to modify their product to obtain a beverage with the claimed Glycemic Index values of the present invention, does not meet the Examiner's burden of establishing a prima facie case of obviousness. To establish a prima facie case of obviousness under 35 U.S.C. §103, the Examiner must meet three basic criteria. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest *all* the claim limitations. See, for example, *In re Vaeck*, 947 F.2d 488 (Fed. Cir. 1991). Applicants respectfully assert that the Office Action fails to establish the first and third criteria, and thus, fails to make a prima facie case of obviousness under 35 U.S.C. § 103.

First, Applicants respectfully assert that there is no suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or combine reference teachings. The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. See *In re Mills*, 916 F.2d 680 (Fed. Cir. 1990). Applicants respectfully assert that there is nothing in the prior art that suggests the desirability of modifying the reference to produce the compositions of the present invention. Indeed, the prior art fails to even discuss the Glycemic Index of the product, much less disclose the aforementioned surprising benefit associated therewith. Therefore, Applicants respectfully submit that the prior art does not suggest the desirability of the present composition, such that it would motivate one skilled in the art to modify the cited reference.

Second, the prior art reference, does not teach or suggest *all* the claim limitations of the present invention, which teaches compositions for use as foods or beverages, comprising one or more flavanols, one or more bracers, and vitamin B, wherein the composition exhibits a Glycemic Index of about 55 or less. It is this particular combination that has surprisingly been found to enhance the perceived positive mood and energy in the consumer, without rapid depletions of blood glucose, while reducing the insulin response. In contrast, the prior art fails to even teach a composition having a Glycemic Index of about 55 or less, much less disclose its relevance to the achievement of the surprising benefits.

Moreover, the prior art does not teach the particular amounts of the various ingredients required to produce the surprising benefits of the present invention. Specifically, the prior art fails to teach that, by combining the ingredients in the particular proportions indicated in the present claims, the perceived positive mood and energy in the consumer is enhanced without rapid depletions of

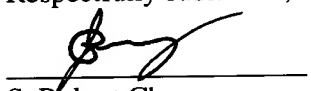
blood glucose, while simultaneously inducing the insulin response. Therefore, Applicants respectfully assert that the prior art does not teach all the claim limitations of the present invention.

Thus, Applicants respectfully assert that the present invention is not obvious in view of the cited prior art references. The present invention is directed to food and beverage composition, which possess a Glycemic Index of about 55 or less and contain particular amounts of various components. This particular combination, along with the specified amounts of each component, is not disclosed in the prior art, nor would the skilled artisan deduce this combination from the cited prior art reference. Moreover, this unique combination has surprisingly been found to enhance the perceived positive mood and energy in the consumer, without rapid depletions of blood glucose, while reducing the insulin response. Therefore, the present invention is not obvious in light of the cited references, and the rejection under 35 U.S.C. § 103 should be withdrawn.

## CONCLUSION

Thus, in view of the foregoing remarks, it is respectfully requested that the Examiner withdraw the rejections under 35 U.S.C. §§ 112, second paragraph, 102(b), and 103(a). If the Examiner believes that personal contact would be advantageous to the disposition of this case, the Examiner is respectfully requested to contact the undersigned.

Respectfully submitted,



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